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No. 001882

IN THE

Supreme Court of the United States

PHIL PARKER, WARDEN,
Petitioner

versus

DAVID LEROY SKAGGS
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

I. DOES THE SIXTH AMENDMENT REQUIRE DEFENSE COUNSEL TO SELECT AN EXPERT WITNESS WHO IS EFFECTIVE AT TRIAL?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are: (1) the Commonwealth of Kentucky; and (2) David Leroy Skaggs

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Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The Attorney General of the Commonwealth of Kentucky, as counsel for Petitioner Phil Parker, Warden, Kentucky State Penitentiary, petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The petitioner seeks a writ of certiorari to review the published Sixth Circuit panel opinion in Skaggs v. Parker, 235 F.3d 261 (6th Cir.)(reh. denied March 16, 2001)(Apx. 1-31). That opinion is a modification of the opinion that was originally announced on October 31, 2000. (Apx. 32-62). The opinion was modified on December 18, 2000 to correct several inaccuracies regarding the procedural history of the case.

The Kentucky Supreme Court affirmed Respondent's conviction and death sentences for a double murder committed during the commission of first-degree burglary and first-degree robbery. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985), cert. denied, 476 U.S. 1130 (1986). On the same day, the Kentucky Supreme Court affirmed the denial of a motion for a new trial. (No. 84-SC-1181-TG, unpublished) (Apx. 214-218).

The Kentucky Supreme Court affirmed the denial of four additional actions for post-conviction relief filed by Respondent: Skaggs v. Commonwealth, Ky., 803 S.W.2d 573 (1990), cert. denied, 502 U.S. 844 (1991) (motion to vacate judgment and consolidated second motion for new trial) (Apx.

205-213); Skaggs v. Redford, 844 S.W.2d 389 (1992) (open records action); and Skaggs v. Commonwealth, No. 94-SC-393-MR (1995, unpublished), cert. denied, 516 U.S. 856 (1995) (third motion for new trial) (Apx. 198-204).

The opinion and judgment of the U.S. District Court dismissing Respondent's petition for writ of habeas corpus is reported as Skaggs v. Parker, 27 F.Supp.2d 952 (W.D. Ky. 1998) (Apx. 67-194).

JURISDICTION

Pursuant to 28 U.S.C. §1254, the Petitioner requests a writ of certiorari regarding the United States Court of Appeals opinion in Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000), which granted federal habeas corpus relief to a state prisoner by vacating his death sentences for a 1981 double murder and ordering a new sentence hearing. The Sixth Circuit denied a petition for rehearing en banc by order issued December 18, 2000. This petition for a writ of certiorari is timely pursuant to Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Title 28 U.S.C. §2254 (prior to 1996 amendment) states in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .
> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination

after hearing on the merits of the factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or officer or agent thereof were parties, evidenced by written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit - -

(1) that the merits of the factual dispute were not resolved in State court hearing; (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or (7) that the applicant was otherwise denied due process of law in the State court proceeding; (8) or unless that part of the

record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of sufficiency of the evidence to support such factual determination, is produced as provided hereinafter, and the Federal court on consideration of such part of the record as a whole includes such factual determination is not fairly supported by the record:

and in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions in paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by clear and convincing evidence the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

The U.S. District Court adopted the account of facts contained in the Kentucky Supreme Court's opinion on direct appeal:

> Herman Matthews was a 76-year-old, semi-retired scrap metal dealer. His wife was 67 years old and frequently helped in the business. Their home was connected to their place of business. He conducted a cash business and always carried large sums of cash on the premises. On May 6, 1981, a neighbor discovered the body of Herman Matthews in his place of business. Later the police found the body of Mae Matthews in the living room. Herman Matthews was shot three times, once in the right chest, once in the lower back and once in the left arm. He also suffered a head injury consistent with being hit with a hammer and not with falling. The head injury and gunshot wounds to the chest and back were each capable of causing death independently of other injuries. Mrs. Matthews suffered two gunshot wounds, one in the left upper chest and one in the left abdomen. One wound occurred while she was standing and the other while she was lying down.
>
> The police investigation led to Columbus, Indiana where they questioned Skaggs. After

having him execute a waiver of rights form, the officers noticed dried blood on Skaggs' shoes. While the police were examining the shoes, Skaggs fled. After a 20 minute foot chase in which warning shots were fired, Skaggs was apprehended. He was arrested on Indiana charges and returned to the local jail.

On May 14, 1981, still in Indiana, the Kentucky police again questioned Skaggs after again advising him of his rights. He told them he was present at the time of the Matthews' killings, but an accomplice, John Davis pulled the trigger. On May 15, 1981, during the trip to Glasgow, Kentucky, Skaggs told police that the footprint on the door of the Matthews house was his and that he had attempted to kick in the door to burglarize.

Police investigation indicated that the alleged accomplice, Davis, was not involved with the crimes. In view of this information, on May 18, 1981, the police again questioned Skaggs and told him that he had a right to an attorney and that one had been appointed for him if he wanted the police to call the attorney. Skaggs indicated that he did not want an attorney, and during the subsequent interrogation, he confessed to having committed the murders of Herman and Mae Matthews during the course of a robbery and stated that he had acted alone.

> After a jury trial, Skaggs was convicted of the murders of Herman and Mae Matthews, and he was also found guilty on two counts of robbery and burglary. At the sentencing phase of the murder conviction, the jury was unable to agree on the penalties for the two murders and was subsequently discharged. Approximately three months later, on June 22, 1982, the penalty phase was retried and a new jury selected. Much of the same evidence introduced at the guilt phase of the first trial was introduced at the retrial of the penalty phase. The final judgment sentencing Skaggs to death for the murder of Herman and Mae Matthews was entered on July 15, 1982.

Skaggs v. Parker, 27 F.Supp.2d 952, 964 (W.D. Ky. 1998), quoting Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 675-676 (1985) (Apx. 68-69).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

THIS COURT HAS NEVER ADDRESSED THE QUESTION WHETHER AN EXPERT WITNESS' PERFORMANCE MAY RESULT IN A SIXTH AMENDMENT DEPRIVATION DESPITE COUNSEL'S EFFECTIVE SELECTION, PREPARATION, AND PRESENTATION OF THAT EXPERT.

The scope of the question presented is narrow. It is not whether counsel may be ineffective in selecting, preparing, or examining an expert witness. Rather, the Petitioner asks this Court to decide whether the alleged incorrectness of an expert's conclusions, without more, may be imputed to counsel for purposes of Sixth Amendment analysis.

The court below overturned Respondent's 18-year-old death sentences by applying what might be described as a res ipsa loquitur theory of counsel ineffectiveness. No fault was found in counsel's initial selection of renown mental health expert Elya Bresler. Nor were Respondent's counsel criticized regarding their preparation of Bresler for trial. It has never been

suggested that Respondent's counsel were substandard in their examination of Bresler on the witness stand. The Sixth Circuit panel viewed Bresler's conclusions as ineffective when compared with the conclusions offered by two new experts 12 years later. The panel reasoned that ineffectiveness on the part of an expert witness perforce renders counsel ineffective under the Sixth Amendment. Cf. Horsley v. Alabama, 45 F.3d 1486, 1496 (11th Cir. 1995).

This Court recognized a Due Process right to a "competent" expert in Ake v. Oklahoma, 470 U.S. 68, 77, 83 (1985). The Sixth Circuit in the present case interpreted Ake's use of the word "competent" as a "suggestion" of witness effectiveness entitlement. Skaggs v. Parker, supra, 235 F.3d at 272. The Sixth Circuit, id. at n.3, noted "Judge Murnaghan's dissent in Ramdass v. Angelone, 187 F.3d 396, 411, n.1 (4th Cir. 1999), in which he chastised the majority's opinion, noting that Ake clearly 'requires more than just a warm body with a prefix attached to his name . . . .'" The Sixth Circuit considered this perceived requirement of witness effectiveness to be a necessary component of counsel effectiveness analysis under the circumstances presented here.

This Court has never addressed whether the Strickland v. Washington, 466 U.S. 668 (1984) test for counsel ineffectiveness should be engrafted onto any expert witness competency requirement envisioned in Ake. The issue here is not so much whether expert witness ineffectiveness may result from counsel ineffectiveness as it is whether, oppositely, counsel ineffectiveness of constitutional dimension may result from no more than an expert's poor performance as a witness or consultant.

In Ake, 470 U.S. at 87, n.13, this Court specifically left open the question presented in this petition ("Because we conclude that the Due Process Clause guaranteed to Ake the assistance he requested and was denied, we have no occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment, in this context."). In view of the disagreement among federal circuits, including the conflicting opinions of the Sixth Circuit, discussed in the next part of this petition, the Petitioner respectfully urges this Court to grant certiorari to resolve this question.

II.

THE FEDERAL COURTS ARE DIVIDED ON WHETHER THE SIXTH AMENDMENT REQUIRES THAT COUNSEL SELECT AN EXPERT WITNESS WHOSE PERFORMANCE IS EFFECTIVE AT TRIAL.

The opinion below itself acknowledges a split of federal authority on this matter, comparing Vickers v. Stewart, 144 F.3d 613, 614 (9th Cir. 1998), "(suggesting that a reviewing court could scrutinize the state's actions regarding providing effective assistance of a defense expert), with Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) ('reject[ing] the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness')." Skaggs v. Parker, supra, 235 F.3d at 272. (footnote omitted).

The Fourth, Fifth, Seventh, and Eleventh Circuits have declined to embrace the concept of an expert witness effectiveness requirement, either under Ake or Strickland. See, e.g., Pruett v. Thompson, 996 F.2d 1560, 1573, n.12 (4th Cir. 1993) ("We will not graft the Strickland effective assistance of counsel test onto the performance of an expert witness in these circumstances."); Poyner v. Murray, 963 F.2d 1404, 1418 (4th

Cir. 1992) ("However, this court in the past has made clear that there is no right to effective assistance of expert witnesses distinct from the right to effective assistance of counsel."); Granviel v. Lynaugh, 881 F.2d 185, 192 (5th Cir. 1989) (no right to particular mental health expert or to particular findings by that expert); Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990) ("A conclusion to the contrary would require this court to engage in a form of 'psychiatric medical malpractice' review as part-and-parcel of its collateral review of state court judgments."); Card v. Dugger, 911 F.2d 1494, 1513 (11th Cir. 1990) ("The fact that this [expert's] assessment was not sufficient to cause the jury to recommend a life sentence or to cause the judge to find the presence of mitigating factors does not mean that counsel was ineffective.").

In Clisby v. Jones, 960 F.3d 925 at 929-934 (11th Cir. 1992)(en banc), the en banc Eleventh Circuit appeared to recognize a very limited Due Process right to **"competent"** assistance by an expert mental health witness but limited this type of claim to information presented to the state trial court at or before sentencing. Cf. id., at 938 (specially concurring opinions of Judges Edmondson and Cox), citing original panel

opinion, 907 F.2d 1047 (11th Cir. 1990). The en banc Eleventh Circuit rejected that claim on the basis that none of the information supplied to the state trial court at the time of the re-sentencing hearing supported Clisby's claim of incompetent assistance by the expert. The Eleventh Circuit left unresolved Clisby's Sixth Amendment claim of ineffective assistance by the expert so that the U.S. District Court could decide that claim on remand, but pointed out, "[W]e have difficulty envisioning a case in which counsel's failure to alert the trial court to the **manifest** inadequacy of an expert's psychiatric assistance would not violate the defendant's right to effective assistance of counsel under the Sixth Amendment." (Emphasis added.) Also see, Provenzano v. Singletary, 148 F.3d 1327 at 1334 (11th Cir. 1998), discussing and applying ruling on competent expert assistance in Clisby. On appeal after remand, the Eleventh Circuit rejected Clisby's claim of ineffective assistance of counsel based upon counsel's selection of the mental health expert and failure to present additional evidence about Clisby's mental condition. Clisby v. Alabama, 26 F.3d 1054 (11th Cir. 1994).

The Eighth and Ninth Circuits have apparently recognized a right to the effective assistance of an expert witness. Shaw v. Delo, 971 F.2d 181, 186-187 (8th Cir. 1992) (evidentiary burden of proving witness ineffectiveness was not met); Vickers v. Stewart, 144 F.3d 613, 615-616 (9th Cir. 1998) (suggesting that a reviewing court could scrutinize the effectiveness of an expert's findings).

The Sixth Circuit has rendered conflicting opinions on this subject. In McQueen v. Scroggy, 99 F.3d 1302, 1313 (6th Cir. 1996), the Sixth Circuit flatly rejected the concept of Sixth Amendment witness ineffectiveness:

> There is no basis for proposition that when an expert gives less than favorable testimony, the attorney eliciting the evidence is unconstitutionally ineffective. Such a holding would be anomalous when the role of the expert is considered. * * * McQueen cannot seriously suggest that an attorney . . . is ineffective whenever he decides to call an expert whose opinion does not directly track, on each point, what the defense hoped to prove.

The opinion in the present case starkly conflicts with what the Sixth Circuit had said in McQueen.[1] The Skaggs panel was persuaded by "Judge Murnaghan's dissent in Ramdass v. Angelone, 187 F.3d 396, 411, n.1 (4th Cir. 1999), in which he chastised the majority's opinion, noting that Ake clearly 'requires more than just a warm body with a prefix attached to his name . . . .'" Skaggs, supra, 235 F.3d at 272, n.3. Citing Strickland, the Skaggs panel concluded that because "Bresler was not a competent witness," his performance and therefore counsel's performance "fell below an objective standard of reasonableness." Id. at 270.

This Court should grant certiorari in order to decide this divisive question.

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[1]The Sixth Circuit is not the only federal circuit to render conflicting opinions on this subject by different panels. Compare Harris v. Vasquez, 949 F.2d 1497, 1516-1518, 1524-1525 (9th Cir. 1990) (rejecting the cognizability of witness effectiveness as either a Due Process or Sixth Amendment claim) with Vickers v. Stewart, supra.

III.

THE OPINION BELOW CONFLICTS WITH THIS COURT'S OPINIONS IN AKE V. OKLAHOMA, 470 U.S. 68 (1985) AND STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984).

Because "psychiatrists disagree widely and frequently on what constitutes mental illness," Ake admonishes against joining a battle of experts on post-conviction review. Id. at 81. Strickland requires a strong presumption that counsel's acts or omissions were products of reasonable decisionmaking. Id. at 689.

In Skaggs, the Sixth Circuit ran afoul of Ake by choosing for itself which of the experts was more beneficial. The Skaggs panel then compounded that error by embracing without question trial counsel's self-serving, post-conviction proclamation of their own ineffectiveness in having used Bresler again at the retrial, contrary to Strickland. The Skaggs panel expressly concedes that counsel were not ineffective in using Bresler for the first trial.[2] Skaggs implicitly concedes that

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[2]In other words, had the first jury not deadlocked, the Skaggs panel would not have found any error in counsel's use of Bresler.

no expert other than Bresler was available for the retrial that occurred barely three months after the first trial. The first trial ended March 12, 1982 with a hung jury. The retrial began on June 23, 1982. (TR 978-979; TE 1517-1673).

Contrary to Ake and Strickland, the Skaggs panel drew every negative inference possible concerning the performance of Bresler and trial counsel. State evidentiary laws and state court findings were not refuted; they were not acknowledged to exist.

1.

The State Court Expressly Found That Under State Law And Based On The Record, Bresler Could Have Qualified As An Expert Despite His Lack Of Academic Credentials.

Under Kentucky law, a witness may qualify as an expert even without a formal education on the subject. Ford v. Seabold, 841 F.2d 677, 693 (6th Cir. 1988), citing Kentucky Power Co. v. Kilbourn, Ky., 307 S.W.2d 9, 12 (1957). Kentucky law also permits lay witnesses who are familiar with a defendant to express an opinion on his sanity. Lawson, The

Kentucky Evidence Law Handbook, Second Edition (Mich. 1984), Section 6.05(a)(4), page 147.

Bresler had practiced psychology for several years prior to Skaggs' trial. He was a popular defense witness for the Kentucky Department of Public Advocacy (DPA), which has continuously represented Skaggs since the inception of this case. DPA's general counsel and another defense attorney recommended Bresler to his DPA trial lawyers. Bresler had already testified as an expert in Smith v. Commonwealth, Ky., 599 S.W.2d 900, 908 (1980), Harston v. Commonwealth, Ky., 638 S.W.2d 700 (1982), and People ex rel. Steck v. Ottolini, Ill.App., 392 N.E.2d 736, 738 (1979). Also see Young v. Commonwealth, Ky., 585 S.W.2d 378, 379 (1979), in which defense counsel sought funds to pay Bresler as an expert witness. Bresler was employed as a psychologist at a state-run mental health facility in Kentucky at least as early as 1979.

The state court made findings of fact that although Bresler had lied about having a college degree and membership in several organizations, he still could have qualified as an expert in this case. (TR 1305-1309, 1310, 1312).

2.

Bresler Did Not Lie About Anything Other Than The Extent Of His Own Credentials, And The Fact That He Exaggerated His Qualifications To The Jury Could Only Have Benefitted Skaggs.

The state court made findings of fact that Bresler did not lie about his examination of Skaggs, his opinion, or anything other than the extent of his own credentials, and further found that the jury had no reason to doubt Bresler. (TR 1310-1311). Obviously, Bresler's exaggeration of his own credentials could only have enhanced his credibility with the jury, redounding to the benefit of Skaggs.

3.

Bresler's Conclusions Were Not "Bizarre".

Bresler conducted numerous tests, including the WAIS intelligence test, during his examination of Skaggs. Bresler concluded, based on the DSM-II (and later the DSM-III), that Skaggs suffered a major depressive disorder, recurrent chronic, severe, and paranoid personality disorder. (TE 2354). Bresler explained to the jury what those disorders were under the DSM, and how Skaggs' mental condition would have impaired his

capacity to conform his conduct to the requirements of law, and further would have caused him to suffer the additional mitigating phenomenon of extreme emotional disturbance. (TE 2355-2358, 2360-2362). Both of those were statutory mitigating circumstances, which resulted in Skaggs' jury being instructed on those specific mitigating factors. (TR 1164-1165).

The Skaggs panel's characterizations of Bresler's testimony as "bizarre", "eccentric", and "psychobabble" are borrowed from DPA's briefs below and all refer to Bresler's extensive use of folksy metaphors. This trial was in rural Western Kentucky, and Bresler's metaphors would have helped ordinary laypeople understand the dynamics of the kinds of mental conditions he was describing. Skaggs' counsel virtually eliminated Bresler's use of metaphors when he testified at the retrial.

4.

The State Court Found That Bresler's Conclusions Were More Beneficial To Skaggs Than The Conclusions Reached By The New Experts.

Skaggs' new experts concluded that he suffered schizotypical personality disorder under DSM-III-R, which is grouped in the same sub-category as the paranoid personality disorder Bresler had found under DSM-III. From the jury's viewpoint, the specific label attached to Skaggs' mental condition would have been irrelevant. The Kentucky Supreme Court found that "the testimony and report of the original expert, Bresler, was more beneficial to Skaggs as a defense than that which is presented by the two latest evaluations." (No. 94-SC-393-MR, March 23, 1995, p.3) (Apx. 201).

Consistent with Dr. Ravani's assessment at trial that Skaggs was not mentally retarded, the two new experts assigned Skaggs an IQ of 73 to 81. (TR XIII 57, 69, 76). The 64 IQ referred to by the Sixth Circuit panel was a test conducted when Skaggs was in elementary school, it represents the lowest score he ever received, and it was lower than the above-70 scores actually found by the new experts. Although the new experts

concluded that Skaggs was retarded in spite of his test scores, no conclusion by them could have eliminated the trial testimony by independent expert Dr. Pran Ravani that Skaggs was not retarded.

5.

It Was Reasonable Strategy For Defense Counsel To Have Highlighted The Beneficial Effects Of The Conclusions By The Independent Expert, Dr. Pran Ravani.

The prosecution used Dr. Ravani as a rebuttal witness. He found no signs of organicity, apparently because Skaggs refused to undergo an EEG. Ravani did, however, conclude that Skaggs had some schizoid tendencies which could develop but had not developed into schizophrenia. In evaluating Skaggs, he found an indication of the mental illness of substance abuse disorder, which could have diminished Skaggs' mental capacity. Ravani acknowledged that Skaggs' schizoid trends could be an indication of developing mental illness, which would be progressive if untreated. (TR 734; TE 2420-2424).

Skaggs' trial counsel made effective use of Ravani's findings. On cross-examination, Ravani testified that he respected Bresler as a forensic psychologist and believed him to be qualified as such. Ravani acknowledged that a personality disorder was a mental illness which would diminish one's mental capacity. He further acknowledged that personality disorders overlap with each other and often are dependent on one doctor's opinion versus another doctor's opinion. (TE 2422-2423).

Although Ravani disagreed with Bresler on some matters, defense counsel made their point that even the prosecution's rebuttal witness agreed with their own expert that Skaggs was mentally impaired.

6.

The Sixth Circuit Panel's *De Novo* Factual Findings Drew Every Negative Inference Possible Concerning Witness Competency And Counsel Effectiveness.

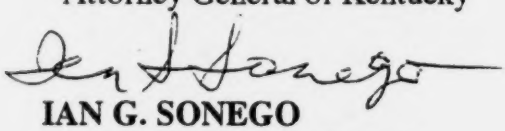
Contrary to Ake and Strickland, the Sixth Circuit panel in this case indulged a strong if not irrebuttable presumption of witness incompetency and counsel ineffectiveness. The Skaggs panel accomplished this by erroneously applying a *de novo*

standard of review. The fact that no state findings are discussed, mentioned, or even hinted to exist is punctuated by the Sixth Circuit panel's having had to issue a modified opinion to correct inaccuracies in the original opinion's recital of the procedural history of this case. Title 28 U.S.C. §2254 contemplates state courts having a greater role than just getting the record organized for purposes of *de novo* review later. Marshall v. Lonberger, 459 U.S. 422, 431-436 (1983).

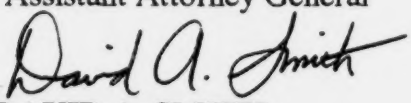
CONCLUSION

For the foregoing reasons, the Attorney General of the Commonwealth of Kentucky requests that this Court grant a Petition for Writ of Certiorari to the Court of Appeals.

ALBERT B. CHANDLER III
Attorney General of Kentucky



IAN G. SONEGO
Assistant Attorney General



DAVID A. SMITH
Assistant Attorney General
Counsel for Petitioner